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DISPUTE RESOLUTION IN A WORLD OF ALTERNATIVES

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Only a decade ago, Professor Frank Sander visualized a courthouse in the year 2000 where litigants (or, more properly, disputants) would face a variety of dispute resolution mechanisms in one "Dispute Resolution Center."[1] That vision is already becoming a reality through programs like the District of Columbia's Multi-Door Courthouse.[2] In addition, a variety of dispute resolution mechanisms has developed outside of the nation's courthouses. Disputants and their lawyers currently are faced with an array of dispute resolution mechanisms among which they can, or may be forced by the courts or opposing parties, to choose.

In this environment, the lawyer's task acquires a new dimension. Not only must the lawyer determine what strategy best serves the client's interests, he or she must also determine what process best serves his or her client's interests. In the past, such choices were limited largely to those cases in which both federal and state courts were available. Thus, the lawyer would choose between two, often very similar, alternatives. Today, however, the task of choosing among alternatives is substantially more complex. Lawyers and the courts are constantly creating new dispute resolution mechanisms. Each mechanism produces new advantages and disadvantages in any particular case.

Too often, the choice among available alternatives is made by default. Traditional litigation is the familiar alternative, and little thought is given to the interests of the client that might be served by choosing other processes. When an opponent proposes an alternative, the lawyer's natural instinct may be to reject it and to seek to retain the familiar trappings of traditional litigation. Even when the courts propose or require use of an alternative to traditional litigation, the advocate may fail to use the process effectively if he or she does not understand how it functions and how it can affect a client's interests.[3]

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1. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 130-31 (1976).

2. *See* Kessler & Finklestein, *The Evolution of a Multi-Door Courthouse*, 37 CATH. U.L. REV. 577 (1988).

3. For a discussion of the resistance to alternative dispute resolution, see generally

This Article will provide guidance for making considered choices among the alternatives that are now available to litigants. The first section describes some of the processes that are in use today, and the range of possible alternatives. The second section examines the uses of alternative processes: what they can and cannot accomplish. Finally, the third section suggests questions an attorney should consider when choosing among alternatives.

I. THE RANGE OF ALTERNATIVES

The number of possible processes for resolving disputes is virtually infinite. One of the benefits of considering alternatives to traditional litigation is the ability to fashion alternatives that meet the specific needs of a particular dispute. Thus, as long as disputes differ from one another, the possibility of new alternatives exists. Recognizing that other processes exist, and continue to develop every day,[4] the processes described below illustrate the major variants that have been developed and are in use today.

A. Arbitration

Arbitration is the best known and most widely developed alternative to litigation. It has been used extensively in commercial and labor relations disputes and in the construction industry pursuant to contract clauses providing for arbitration.[5] The American Arbitration Association (AAA) has established rules for arbitration,[6] and many parties choose to follow these procedures. In addition, arbitration clauses are specifically enforceable under both federal and state statutes.[7]

Although arbitration resembles traditional litigation in that it provides for a binding determination of a dispute by a third party, it differs from litigation in two important respects. First, the parties normally have a role in selecting the third party who ultimately resolves their dispute. For example, under AAA rules, parties to an arbitration are presented with a roster of available arbitrators, and each party ranks the potential arbitrators in order of preference.[8] The AAA then selects an arbitrator or arbitrators, attempt-

Milhauser, *The Unspoken Resistance to Alternative Dispute Resolution,* 3 NEGOTIATION J. 29 (1987).

4. The development and use of alternatives is reported in at least two periodicals: *Alternatives,* published by the Center for Public Resources on a monthly basis; and BNA's *Alternative Dispute Resolution Report,* published biweekly.

5. The leading reference on commercial arbitration is G. WILNER, DOMKE ON COMMERCIAL ARBITRATION (rev. ed. 1987).

6. COMMERCIAL ARBITRATION RULES (American Arbitration Assoc. 1988) [hereinafter AAA RULES].

7. *See, e.g.,* 9 U.S.C. §§ 1-14 (1982); D.C. CODE ANN. §§ 16-4301 to -4319 (1981).

8. AAA RULE *supra* note 6, at rule 13.

ing to accommodate the indicated preferences.[9] In other cases, the parties may select arbitrators through a contractual arbitration clause, or each party may select one arbitrator who together will choose a third. The parties' active role in the selection of an arbitrator enables them to choose an arbitrator with expertise in the subject matter of the dispute or other unique qualifications to serve.

The second important difference between arbitration and traditional litigation is the flexibility of procedures available in arbitration. The parties may choose the extent to which they wish to be bound by formal procedural rules, and may define their own procedure. There is often limited discovery in arbitration proceedings[10] and rules of evidence are loosely followed.[11] Frequently, direct testimony in arbitration proceedings is presented in writing, and presentation of evidence at the arbitration hearing is limited to cross-examination based on the written direct testimony. The flexible procedure usually allows arbitration to proceed more rapidly than traditional litigation, and expedited hearings and decisionmaking are sometimes required by the rules governing the arbitration.[12]

Arbitration decisions are meant to be final, and generally there are no appeals.[13] Arbitration decisions may, however, become the subject of litigation if one party refuses to comply with an arbitration award and the other party seeks enforcement under either federal or state statutes.[14] Such actions, however, are limited to the arbitration award's enforceability and normally do not involve the merits of the underlying dispute.[15]

A number of courts, including the District of Columbia Superior Court,[16] federal district courts,[17] and state courts[18] have adopted court-annexed arbi-

9. *Id.* For other appointment methods approved by the AAA, see *id.* at rules 14-15.

10. *See, e.g., id.* at rule 10 (providing for an "exchange of information . . . [a]t the request of the parties or at the discretion of the AAA.").

11. *Id.* at rule 31 (providing that "conformity to legal rules of evidence shall not be necessary").

12. For example, AAA rules require an award within 30 days from the close of hearings, unless the parties otherwise agree. *See id.* at rule 41.

13. *See* G. WILNER, *supra* note 5, §§ 32.00-.02, at 457-61.

14. *See, e.g.,* 9 U.S.C. §§ 9-10 (1982); D.C. CODE ANN. § 16-4311 (1981).

15. *See* 9 U.S.C. §§ 9-10; D.C. CODE ANN. § 16-4311. The statutes also allow for an award modification or correction under limited circumstances, including evident miscalculation or mistake in description of people or things. Such modification should not affect the award's merits. 9 U.S.C. § 11; D.C. CODE ANN. § 16-4312.

16. *See* Kessler & Finklestein, *supra* note 2, at 578. *See generally* SUPERIOR COURT MANDATORY ARBITRATION RULES (1987).

17. Programs in federal district courts are described in *Court-Annexed Arbitration and Experimentation: Hearing on H.R. 4341 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on Judiciary,* 99th Cong., 2d Sess. (1986).

18. A summary of state and district courts with mandatory court annexed arbitration

tration programs. Under these programs, litigants are either given the option or are required to submit their dispute to arbitration.[19] As with other forms of arbitration, the litigants normally have some voice in choosing an arbitrator or arbitrators, and procedural and evidentiary rules are ordinarily relaxed.[20] If the parties do not choose to be bound by the arbitration award, they may reject the award and proceed to trial. If, however, they do not receive a better result after trial than that awarded in the arbitration they are usually penalized through the assessment of certain costs.[21]

B. Mediation

Mediation of legal disputes, known for nearly 4,000 years, is as old as the oldest written codes.[22] Today, it is used less extensively than arbitration, although its use has grown in recent years.[23]

As with arbitration, mediation involves the use of neutral third parties. However, mediation does not result in a binding decision by the third party. Rather, mediators serve to facilitate negotiations between disputants in an attempt to reach an agreement that all sides will voluntarily accept. Although the mediator's exact role will depend on the needs and the wishes of the parties to the mediation, the mediator's functions generally include: defining the issues, clarifying the disputants' interests, providing a channel for communication, focusing the negotiations on productive areas of discussion, proposing options for resolution of the dispute, assisting the parties in documenting any agreement, and clarifying the alternatives to agreement.[24] In complex disputes, mediators also play a coordinating and educational

programs is contained in Hensler, *What We Know and Don't Know About Court Administered Arbitration,* 69 JUDICATURE 1, 3 (1986).

19. *See id.* at 2.

20. *Id.*

21. The District of Columbia program requires a party demanding a trial de novo to pay certain costs if he or she does not receive an award at least 10% more favorable than the arbitration award. The costs include: a fee of $100 for the arbitrator's services; the costs of any arbitrators not provided by the court; the opposing party's costs for the arbitration and trial de novo, excluding attorney's fees; the opponent's expert witness fees; and, if a defendant, interest on the arbitration award. SUPERIOR COURT MANDATORY ARBITRATION RULE 13 (1987).

22. In ancient Sumerian society, a plaintiff was required to submit his claim to a "mashkim," whose duty was to attempt to settle the case between the parties. Only if the parties failed to reach a settlement, or in certain important cases, was the case put before a judicial panel. The mashkim also sat on the judicial panel. C. WOOLLEY, THE SUMERIANS 93-94 (1928).

23. *See* J. HENRY & J. LIEBERMAN, THE MANAGER'S GUIDE TO RESOLVING LEGAL DISPUTES: BETTER RESULTS WITHOUT LITIGATION 62 (1985).

24. For a comprehensive view of a mediator's role, see generally C. MOORE, THE MEDIATION PROCESS (1986).

role, often providing a forum for settlement of a dispute that might otherwise be brought to court simply because there was no institution available to organize the disputants effectively.[25]

The characteristics of the person or persons chosen to mediate will depend on the nature of the dispute and the type of intervention thought to be necessary. In some cases, disputants will make their choice based on the trust and respect they have for the mediator. In other cases, a mediator will be chosen on the basis of his or her expertise in the dispute's subject matter. Other mediators will be chosen because of their stature and respect in the community relevant to the dispute. Increasingly, mediators are being chosen who have developed an expertise in the practice of mediation and dispute resolution, or who can provide the necessary coordinating services in complex disputes.

C. Minitrial

The minitrial is a formal presentation of evidence and arguments to representatives of both parties.[26] The presentation is made by attorneys for the parties, usually without witnesses. Rather, the attorneys summarize the important evidence and arguments. Minitrials normally last only one or two days, and presentations are limited to either the most important issues, or those about which there is the most dispute.

The purpose of the minitrial is to promote settlement by providing parties with a realistic view and the likely outcome of the litigation. The presentations are made to representatives of the parties with settlement authority, and settlement negotiations are normally scheduled to follow the presentation. With each side having heard both its best arguments and the opponent's best arguments, there is a common basis for evaluating the likely outcome of continued litigation. Understanding the probable results of litigation frequently helps the parties reach an agreement for prompt settlement of the dispute.

Minitrials normally include a neutral advisor who serves as a moderator for the actual presentations, and who can serve a number of roles in subse-

25. This is particularly true with respect to disputes arising under the Superfund legislation, 42 U.S.C. §§ 9601-9657 (1982), where a number of firms provide mediation services. Similarly, courts have turned to "settlement masters" in order to facilitate settlement of complex disputes that have ripened into litigation. *See, e.g.*, Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337 (1986).

26. For a more complete description of minitrials and their uses, see Green, *The CPR Legal Program Mini-Trial Handbook* in CORPORATE DISPUTE MANAGEMENT 1982 MH-1 (Center for Public Resources ed. 1982) [hereinafter CORPORATE DISPUTE MANAGEMENT]; Parker & Radoff, *The Mini-Hearing: An Alternative to Protracted Litigation of Factually Complex Disputes*, 38 BUS. LAW. 35 (1982).

quent negotiations. Frequently, the neutral advisor serves as a mediator between the parties in the settlement negotiations. Sometimes the neutral advisor is asked to give his or her opinion as to the likely outcome of the litigation, or as to settlement options. The parties may also agree, either before the minitrial or during subsequent negotiations, to be bound by the neutral advisor's opinion.

The minitrial is most helpful in cases involving complex factual disputes. Often the parties do not fully understand important details underlying a factually complex dispute, particularly if the parties are large corporate bodies and the dispute developed at the corporate structure's lower levels. A presentation of the evidence and explanation of opposing views may clarify the basis of the dispute and suggest options for resolution. The procedure is also helpful where the parties have unrealistic assessments of the litigation's outcome because they have not focused on the strengths of the opposing party's position or the weakness of their own. By forcing the parties to focus on the strengths and weaknesses of the cases, the minitrial may bring into line the two parties' views regarding the likely outcome of the case.

D. Summary Jury Trial

The summary jury trial is similar to a minitrial, but is designed specifically for cases that would be tried to a jury.[27] As with a minitrial, the summary jury trial is an abbreviated presentation of evidence and arguments for both sides, with both parties in attendance. However, in the summary jury trial the presentation is also made to a panel of jurors which is selected to be as representative of an actual jury as possible. After the presentation, the jurors are asked to render a verdict. This verdict then becomes the basis for the parties' settlement discussions.

The purpose of the summary jury trial is similar to that of the minitrial. Although the presentations are abbreviated and witnesses normally are not presented, the jury's decision gives the parties an unbiased evaluation of a trial's likely outcome. With this basis, settlements are often reached. The technique is most helpful where the parties have strongly divergent views about the outcome and have held those views despite prior settlement efforts.[28]

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27. Judge Thomas D. Lambros of the United States District Court for the Northern District of Ohio, who invented the summary jury trial, has described many aspects of the procedure in Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461 (1984).

28. Cases in which the outcome is primarily dependent on the credibility of one or a few witnesses are less suited to summary jury trials because witnesses normally are not presented.

E. Private Judging

Private judging is in many respects a less traditional form of arbitration. As with arbitration, parties refer their dispute to the binding decision of a third party, whom they choose, and proceed under rules which they fashion.[29] The primary difference between private judging and arbitration is that private judging tends to be more ad hoc in nature. Traditional arbitration usually is employed when parties to a contract agree, well before a dispute has arisen, that they will resolve disputes relating to the contract by arbitration. The agreement to arbitrate normally does not specify procedures, and predetermined standard procedures such as those established by the AAA[30] are normally contemplated. Private judging, on the other hand, is usually a solution designed by the parties to a particular dispute after the dispute has arisen, and procedures are custom-designed to deal with that dispute.[31] The parties are thus free to design the proceeding in a way that they feel is appropriate, without the restrictions of standard procedures.

A number of states have integrated the concept of private judging into their court systems. California, for example, allows reference of matters filed in state courts to a private judge for findings of fact and conclusions of law.[32] The decision of the private judge, whom the parties may choose, becomes the decision of the court. Although the private judge's decision is subject to the normal appellate process, it is not subject to trial de novo.[33] Such procedures generally provide somewhat less flexibility than pure private judging, as there is at least an expectation that standard rules of procedure will be followed. However, some variation by agreement of the parties may be permitted.[34] While such procedures have less flexibility than pure private judging, they do retain the advantages of allowing litigants to select a judge and to by-pass crowded court calendars.

F. Expert Fact Finding

Disputants may request a neutral expert to perform an investigation into

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The procedure could be adapted by allowing presentation of crucial witnesses, but it may be difficult to predict whether the outcome of a credibility contest in a summary proceeding will be representative of the results at trial.

29. A number of private firms now provide services in referring suitable third parties and organizing proceedings.

30. *See supra* notes 6-12 and accompanying text.

31. *See generally* Green, *Avoiding the Legal Logjam—Private Justice, California Style,* in CORPORATE DISPUTE MANAGEMENT, *supra* note 26, at 65.

32. CAL. CIV. PROC. CODE §§ 638-645 (West Supp. 1988). Similar statutes in other states are summarized in Green, *supra* note 31, at 65, 76-79.

33. *See, e.g.,* CAL. CIV. PROC. CODE §§ 644-645 (West Supp. 1988).

34. *See* Green, *supra* note 31, at 67.

facts relevant to a dispute and report either a determination of the disputed facts or a narrowed set of disputed facts. The disputants may agree to be bound by the expert's findings, or may use the findings as a basis for settlement discussions.[35] Similarly, reference to an expert may be made in the course of litigation pursuant to *Federal Rule of Civil Procedure* 53[36] and *Federal Rule of Evidence* 706.[37]

G. Other Applications

The techniques described above are just a few of the alternatives to litigation that currently exist. Most new alternatives developed apply the concepts and techniques described above. For example, the concept of mediation is at the heart of a program, initiated by the United States District Court for the Northern District of California in 1985, referred to as "early neutral evaluation."[38] This program, designed primarily to promote efficient handling of litigation, provides for an evaluation of litigation by a court-appointed neutral within 160 days after an action is filed.[39] The neutral suggests ways that the dispute could be litigated most efficiently and may propose options for settlement.[40] Similarly, the District of Columbia Superior Court's Multi-Door Courthouse utilizes early neutral evaluation.[41]

A type of mediation has also been applied to the process of promulgating regulations. Regulatory decisions are often subject to challenge through litigation. Both federal and state governments have sought to avoid such litigation through "regulatory negotiation." In this process, the proposing agency and interested groups meet together to negotiate the content of regulations

35. The technique of private judging and expert fact finding can be combined through a private trial with experts. Such a procedure was used in a recent case involving alleged misappropriation of trade secrets. In that case, a private trial was held before a jury of engineers. Based on partial proceedings in the private trial, a settlement was agreed to by the parties. *See Expert Jurors Spur Accord at High-Tech Private Trial,* 5 ALTERNATIVES, Dec. 1987, at 193.

36. FED. R. CIV. P. 53. Rule 53(b) provides for the reference of complicated matters to special masters. *Id.* at rule 53(b). The master's report is accepted in a nonjury trial unless clearly erroneous, and the report may be introduced as evidence in a jury trial. *Id.* at rule 53(e)(2), (3).

37. FED. R. EVID. 706. Rule 706(a) provides for the court's appointment of a neutral expert who may be called to testify by either party. *Id.* at rule 706(a). A court appointed expert's conclusions will carry particular weight in settlement discussions, as the court may authorize the parties to disclose that the expert was court appointed and, therefore, neutral. *Id.* at rule 706(c).

38. General Order No. 26 Regarding Early Neutral Evaluation (N.D. Cal. May 21, 1985) (amended July 22, 1986).

39. *Id.* § 3.j.

40. *Id.* § 6. See Levine, *Early Neutral Evaluation: A Follow Up Report,* 70 JUDICATURE 236, 240 (1987), for an evaluation of the early phase of this program.

41. *See* Kessler & Finklestein, *supra* note 2, at 582, 590 n.50.

prior to their adoption. If a proposed regulation can be agreed upon through such negotiation, subsequent litigation normally can be avoided. Regulatory negotiations have been successful at the federal level in environmental and airline matters[42] and at the state level in regulated industry pricing matters.[43] The negotiations frequently involve intervention of a third party neutral acting as a mediator.

Outside of the regulatory context, numerous federal agencies have developed programs or policies for the use of various litigation alternatives. The alternatives adopted have covered the entire range of dispute resolution techniques.[44]

II. THE USES OF ALTERNATIVES

The development of alternatives to litigation has been accompanied by a number of misconceptions about what these alternatives can accomplish. To make effective use of the available choices it is important to understand what can and cannot be accomplished by using alternative means of dispute resolution.

First, alternatives to traditional litigation are not a complete substitute for litigation. Alternatives are appropriate in only some circumstances. In a world of alternatives, the lawyer should not jump at the prospect of using an innovative tool when traditional litigation may work best. Rather, the lawyer should carefully consider his or her client's interests, and whether there is an alternative that may serve those interests more effectively than traditional litigation.[45]

Second, alternatives should not be seen solely as a way to achieve a more favorable resolution than could be achieved through traditional litigation. Alternatives are aimed at improving the *process* of dispute resolution and should not be rejected merely because the lawyer or client does not anticipate that the alternative will lead to a more favorable outcome. Although some processes are chosen because they permit results that are more favorable for all parties than could be achieved through traditional litigation, often a lawyer has no way of predicting the outcome. The inability to pre-

42. *See EPA Soon to Issue Negotiated Rule on Wood-Heater Pollution Standards,* 5 ALTERNATIVES, Jan. 1987, at 3; *Federal Agencies Focus on "Negotiated Rulemaking,"* 4 ALTERNATIVES, Mar. 1986, at 4.

43. *See generally* THE EDISON ELECTRICAL INSTITUTE, EVALUATION OF THE EDISON ELECTRIC INSTITUTE DEMONSTRATION PROJECT ON PRINCIPLED NEGOTIATION, EXECUTIVE SUMMARY AND FINAL REPORT (1987).

44. *See generally* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION (1987).

45. Some of the factors that should be considered are discussed *infra* pp. 601-04.

dict a better result should not obscure the other advantages of an alternative process, such as a faster or less costly resolution of the dispute.

Furthermore, use of alternatives should not be seen as an admission that compromise is necessary. Some alternatives do serve to facilitate settlement by promoting compromise, but many, such as binding arbitration, are designed to resolve disputes without compromise. Even more importantly, some alternatives can facilitate a result that is better for all parties involved in a dispute than would be available through traditional litigation. Thus, a lawyer should not reject use of an alternative for fear of signaling a willingness or a need to compromise.

Today's alternatives to traditional litigation improve the dispute resolution process in a number of ways. Traditional litigation hinders the process of arriving at a settlement in several, important respects. First, the demands of the advocacy process tend to force litigants and their lawyers to advance extreme views of their case. Even though the litigant and his or her lawyer may acknowledge to themselves that the view they advocate is extreme in some respects, the process cannot help but drive parties away from agreement rather than toward agreement. Second, the discovery process tends to create new disputes that further alienate opposing sides and divert attention from the underlying dispute. Although discovery does result in an exchange of information often necessary for settlement, it does so slowly and without necessarily focusing on the information that would be most useful for settlement.

Alternatives to litigation can be designed to overcome barriers to settlement. Where traditional litigation tends to draw the parties' view of the case apart, minitrials and summary jury trials attempt to bring these views together. Where traditional litigation multiplies the issues, arbitration streamlines the process reducing the opportunity for diversion. Mediation serves a similar function through the imposition of a third party who is assigned the task of keeping the process focused on core issues. Mediators can also determine what information is important to negotiating an agreement and can thereby focus information exchanges on those important areas.

Even if a dispute is not settled by agreement of the parties, alternatives can improve the decisionmaking process in some cases. The courts are well suited to interpreting the law and deciding the facts in cases that involve the application of common sense and good judgment. Many disputes, however, involve neither of these characteristics. Thus, if a dispute involves a complex factual matter, resort to arbitration, private judging, or expert fact finding can avoid lengthy education of a judge or jury, and can place the decision in the hands of persons who have an existing understanding of the issues.

Even where a dispute is of a type that courts and juries handle well, other interests of the parties may still make an alternative preferable. For example, both parties may feel that the court's elaborate procedural protections are not necessary and that speed of resolution is more important. In that case, arbitration or private judging may be appropriate. The parties may also place a premium on minimizing public disclosure of the dispute or the facts surrounding it. Again, an alternative such as private judging can serve the parties' interests in privacy.[46]

In short, alternatives to litigation are crafted to meet specific shortcomings in the traditional litigation process. An alternative should be used because it addresses a shortcoming that applies to the particular dispute, and only to the extent that it does so. Without limiting the application of alternatives in this way, resorting to an alternative is likely to produce only disappointment and delay.

III. THE CHOICE OF ALTERNATIVES

To choose among the available alternatives, including traditional litigation, a lawyer must focus on his or her client's interests in both the outcome and the process of resolving the dispute. In doing so, the lawyer should balance the client's interests in both the process and the outcome. Furthermore, the lawyer should consider both parties' attitudes toward settlement, the barriers to settlement, and the factual and legal issues to be decided if a settlement is not reached. This section outlines each of these areas in detail and assesses their impact on the choice of alternatives.

In considering whether to pursue an alternative to traditional litigation, a lawyer should be careful to identify, separate, and balance a client's interest in the process of dispute resolution and the client's interests in the outcome of the dispute. The process chosen to resolve a dispute potentially affects the dispute's outcome. Sometimes it is expected that the effect on the outcome will be relatively favorable, while at other times it is expected that the effect will be relatively unfavorable. However, often it is difficult to predict what effect a process will have on the outcome. Where an alternative process will serve some interests of the client as in prompt resolution of the dispute, but impair others, as in increasing the likelihood of a compromise as opposed to a complete victory, the lawyer and the client must determine whether the

46. There is an important issue as to whether and when the public has interests that are more important than these private interests and whether those interests can be met only by traditional litigation. For a discussion of this issue, see generally Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 U.C.L.A. L. REV. 485 (1985).

interest in a prompt outcome is more important than the interest in a favorable outcome. Further, the lawyer and the client must determine whether a way to accommodate both interests exists.

With this framework in mind, the lawyer should consider a number of questions regarding the dispute and the parties. The first consideration should be the parties' attitudes toward settlement. Both parties may want to settle as soon as possible if a satisfactory settlement can be worked out. Or, on the other hand, one party might wish to delay resolution of the dispute, particularly if that party expects an unfavorable outcome.[47]

If both parties are amenable to a prompt settlement, the lawyer should then consider what barriers might impede prompt settlement. In doing so, the lawyer should take into account the history of the dispute and the history of any settlement discussions that may have occurred. If the parties have been unable to settle because they are both convinced they will ultimately prevail, a minitrial or summary jury trial may alter one or both of the parties' perceptions.[48]

If, on the other hand, the lawyer perceives that the barrier to settlement is the result of animosity between the two parties, he or she should ask whether a mediator's skills might overcome this obstacle. Many mediators, skilled at focusing discussions on how to serve the interests of the parties, put relationship problems to one side. If the animosity reflects a lack of trust between the parties, a mediator that already has the respect of both parties may be able to propose a solution acceptable to both sides. If nothing else, a mediator may be able to establish communication between the parties through some form of "shuttle diplomacy."

The lawyer should also consider whether the barrier to settlement is the difficulty of sorting out the relevant facts. If so, a procedure of joint fact finding, perhaps through some form of minitrial or use of a neutral expert, may provide sufficient agreement on the factual background to facilitate a settlement.

Even when the litigants' efforts are focused on overcoming the barriers to settlement, some cases are simply not amenable to settlement. If the lawyer

47. The fact that one party may be interested in postponing resolution of the dispute does not necessarily mean that no alternative is feasible. An alternative that ultimately takes the same amount of time as litigation may still be preferable for a number of reasons. For example, some arbitrations take as long as traditional litigation, but are advantageous because of the arbitrators' familiarity with the dispute's subject matter. Furthermore, a settlement may be able to take into account the party's interest in postponing resolution of the dispute by postponing or stretching out payments of damages.

48. In some cases, a minitrial or summary jury trial procedure may be unwarranted because of the small amount at stake. In such situations, a less formal presentation to the parties and/or a neutral evaluator may be appropriate.

is firmly convinced that barriers to settlement cannot be overcome, he or she should assess the nature of the dispute and whether traditional litigation is the best way to proceed. This assessment should focus on the nature of the legal and factual questions presented by the dispute.

With respect to legal issues, the first question should be whether there are any legal issues that are central to resolution of the dispute. While every case is likely to involve some legal questions, in many cases these questions are plainly secondary to the factual issues involved. If the legal questions are secondary, there may be little need for traditional litigation mechanisms that are designed to resolve legal issues. The parties may find they can focus on the factual dispute and put minor legal issues aside for the sake of a more prompt resolution, perhaps through arbitration.

Even if there are substantial legal questions, it may be possible to devise a process that allows for resolution of those questions within traditional litigation, but permits factual questions to be decided using an alternative. Special masters or neutral expert procedures would be particularly appropriate in such a situation. Factual issues could be referred to a master or expert, and the court could rule on legal issues either prior to or after the referral.

With respect to factual questions, the lawyer should consider whether the facts are particularly complex or technical. If they are, both sides may prefer to have the matter referred to someone better suited than a judge or jury to consider the matter. The lawyer should also consider whether traditional discovery methods are well suited to the facts involved in the case. For example, where a mass of technical data is relevant to the dispute, the traditional exchange of document requests, interrogatories, and depositions of experts will be cumbersome at best and counterproductive at worst. If the parties are truly interested in an efficient resolution of the dispute, they should consider an exchange of information managed by opposing experts or supervised by a neutral expert. Indeed, such a case may lend itself to having the neutral expert decide the facts, or at least present a concise summary of the disputed issues and the evidence that he or she examined.

The lawyer should also determine whether there are any factual issues that depend on the credibility of one or more witnesses. Credibility questions are largely questions of judgment based on common sense and understanding of human nature. Judges and juries are uniquely qualified to make such determinations. Furthermore, a credibility judgment by a judge or jury carries a degree of legitimacy that is important to the satisfactory, final resolution of a dispute. Accordingly, where credibility is an important issue, such determinations should normally be left to a judge or jury through tradi-

tional litigation.[49]

Another important consideration is the extent to which a few, definable issues are central to the outcome of the dispute. If such issues can be isolated, it may be possible to resolve them at the outset, thus clarifying the likely course of subsequent litigation and facilitating settlement of the remaining issues. Resolution of these issues may be achieved through a variety of mechanisms, including expert fact finding and careful scheduling of traditional litigation.

IV. CONCLUSION

The development of alternatives to traditional litigation has provided lawyers with new opportunities to satisfy litigants' interests in the process by which disputes are resolved as well as the outcome of disputes. In order to address these interests, lawyers should ask questions such as those addressed in this Article and should consider all available or conceivable options. Just as the interests of opposing litigants in the outcome of a dispute conflict, their interests in process issues may also diverge. When this occurs, the lawyer who has carefully considered all alternatives will be in a better position to serve all of his or her clients' interests in the resolution of their disputes.

49. This does not mean an alternative might not be useful in resolving other issues in a dispute. For example, a series of technical questions could be resolved by a special master, with credibility questions reserved for determination by a judge or jury.